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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

STATE OF NEW MEXICO,

Petitioner,

vs.

JOHN B. WORK,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of New Mexico

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a speedy trial claim, does the "presumptively prejudicial" delay which triggers inquiry into the four *Barker v. Wingo* factors also require the prosecution to demonstrate an absence of prejudice to the defendant?

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No. _____

In The

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October Term, 1990

STATE OF NEW MEXICO,

Petitioner,

vs.

JOHN B. WORK,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of New Mexico

PETITION FOR WRIT OF CERTIORARI

The petitioner, State of New Mexico, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Mexico entered in this proceeding on September 6, 1990.

OPINION BELOW

The opinion of the New Mexico Supreme Court, which is not yet reported, appears in the Appendix.

JURISDICTION

1. judgment of the New Mexico Supreme Court was entered on September 6, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Sixth Amendment:

"In all criminal proceedings, the accused shall enjoy the right to a speedy . . . trial . . . "

Constitution of the United States, Fourteenth Amendment:

" . . . [N]or shall any State deprive any person of life, liberty or property, without due process of law . . . "

STATEMENT OF THE CASE

On April 24, 1986, Respondent John Work was arrested and charged in magistrate court with criminal solicitation. He posted bond and was released the same day. On September 22, 1986, the state dismissed those charges without prejudice, in order to present the matter to a grand jury. On December 16, 1987, a grand jury indicted Respondent on four counts of criminal solicitation, and one count of aggravated battery. The incident concerned allegations that Respondent had hired Gloria Bustos to commit aggravated battery upon another person. Following numerous pre-trial motions and an interlocutory appeal by Respondent, a jury trial was

scheduled for August 22, 1988. On July 11, 1988, Respondent moved to dismiss the charges on speedy trial grounds.

On August 18, 1988, the trial court held a hearing on the speedy trial claim. Respondent argued that the speedy trial claim should include the fifteen months when the magistrate court charges were dismissed, because the dismissal was done in bad faith. The prosecution responded that the charges had been dismissed in order to resolve the cases against the co-defendants. Respondent submitted an affidavit which described his anxiety during this period, and which alleged problems with a witness' faded memory of Respondent's conversation with Bustos. The state countered that Respondent's grand jury testimony indicated that the alleged witness left before the conversation between Respondent and Bustos took place. The trial court dismissed the charges on speedy trial grounds.

The state appealed to the New Mexico Court of Appeals. Respondent argued that the state must prove that Respondent was not prejudiced by the delay. Work's Answer Brief, pp. 19-22. The state argued that Respondent bore the burden of showing prejudice, and had not carried that burden. State's Reply Brief, pp. 7-9. The New Mexico Court of Appeals reversed the trial court and ordered the changes reinstated. The Court of Appeals held that Respondent bore the burden of demonstrating prejudice in order to have that factor weighed in his favor. App. at 31-32. The Court of Appeals reasoned that a presumptively prejudicial delay had occurred, but that such a delay merely functioned as a "triggering mechanism," causing an inquiry into the four-part weighing

process described in *Barker v. Wingo*, 407 U.S. 514 (1972). App. at 29, 31. That court refused to weigh the prejudice component of the four-part test in Respondent's favor based solely upon a presumptively prejudicial delay. App. at 31.

Respondent sought certiorari in the New Mexico Supreme Court, arguing among other things, that a presumptively prejudicial delay required the state to show a lack of prejudice to the accused in the four-part weighing process. Work's Petition for Writ of Certiorari, pp. 5-9. The state responded that the presumption of prejudice from the delay was only a triggering mechanism and that Respondent must show prejudice specifically to prevail on that component of the test. State's Response To Petition for Writ of Certiorari, pp. 7-8.

The New Mexico Supreme Court granted certiorari and reversed the Court of Appeals. The Supreme Court stated that it had granted review in order to explain the function of the presumption of prejudice arising from a lengthy delay. App. at 1-2. The Supreme Court held that a presumptively prejudicial delay shifted the burden to the state. App. at 5-7. The Court held that the presumption created a probability of prejudice, which the state was obliged to rebut. App. at 7. Because of this, the Supreme Court weighed the prejudice factor in Respondent's favor. App. at 7-8. The Court concluded that the reasons for the delay weighed slightly in the state's favor, while the other three factors weighed in Respondent's favor. App. at 8. Though the strength of Respondent's factors was not "overwhelming", the Supreme Court found a speedy trial violation and dismissed the indictment. App. at 8. Two

justices dissented, arguing, inter alia, that a presumptively prejudicial delay did not require the state to show an absence of prejudice. App. at 18-20.

REASONS FOR GRANTING THE WRIT

1. The Opinion Below Reflects A Widespread Conflict Among Many Jurisdictions Concerning The Application Of *Barker v. Wingo's* Test For Speedy Trial Claims.

In *Barker v. Wingo*, this Court formulated the test for determining speedy trial claims. *Barker* stated that there must first be a delay of such length as to be considered "presumptively prejudicial." *Barker*, 407 U.S. at 530. Such a delay functions "to some extent as a triggering mechanism." *Id.* Once such a delay exists, four factors are then examined and weighed in a balancing test: The length of the delay, the reasons for the delay, the defendant's assertion of his speedy trial rights, and any prejudice to the defendant. *Barker*, 407 U.S. at 530-533.

Lower court decisions indicate that considerable confusion exists concerning the relationship between the finding of a presumptively prejudicial delay, and the existence of prejudice in the subsequent weighing process. As a result, there is widespread conflict among the jurisdictions concerning which party bears the burden of showing prejudice, or its absence, when the four-part *Barker* test is applied.

Some cases refuse to presume prejudice from the delay itself, and require a defendant to show particularized prejudice in order to prevail on that element of

the *Barker* test. Those cases require a defendant to bear the burden of showing specific prejudice, in order to have that factor weigh in his favor in the weighing process. E.g., *Perron v. Perrin*, 742 F.2d 669, 677 (1st Cir. 1984) (petitioner failed to show substantial prejudice from the delay); *United States v. Koskotas*, 888 F.2d 254, 257-258 (2nd Cir. 1989) (a mere possibility of prejudice is not enough to tilt the fourth *Barker* factor in defendant's favor; he must show a likelihood of prejudice); *United States v. Hill*, 622 F.2d 900, 910 (5th Cir. 1980) (in absence of affirmation of specific prejudice, anxiety inherent in any delay is insufficient); *United States v. DeClue* 899 F.2d 1465, 1471 (6th Cir. 1990) (substantial prejudice must be shown by accused); *United States v. Sears, Roebuck and Co.*, 877 F.2d 734, 740 (9th Cir. 1989) (defendant did not make a showing of prejudice; possibility of prejudice standard has been rejected); *United States v. Jenkins*, 701 F.2d 850, 857 (10th Cir. 1983) (defendant shows no actual prejudice); *United States v. Hernandez*, 724 F.2d 904, 906 (11th Cir. 1984) (rejects argument that delay itself has prejudicial effect, notes defendant has made no showing of prejudice).

In conflict with these cases, many other jurisdictions presume prejudice from a lengthy delay, and place the burden upon the prosecution to show an absence of prejudice. *E.g., Taylor v. State*, 429 So.2d 1172, 1174-1175 (Ala. Ct. App. 1983) (presumptively prejudicial delay allows presumption of prejudice; burden shifts to government to demonstrate defendant has not been prejudiced); *Parks v. United States*, 451 A.2d 591, 600-602 (D.C. App.) *cert. denied*, 461 U.S. 945 (1983) (delay of one year or more shifts burden to government to convincingly outweigh assertion of prejudice); *People v. Jones*, 472 N.E.2d 455, 463

(Ill. 1984) (delay may be so long that prejudice will be presumed without requiring any demonstration); *People v. Ross*, 378 N.W.2d 517, 521 (Mich. App. 1985) (six-month delay triggers investigation of speedy trial claim; delay of eighteen months shifts burden to prosecutor to prove defendant has not been prejudiced); *State v. Harvey*, 713 P.2d 517, 521 (Mont. 1986) (presumptively prejudicial delay shifts burden to state to show absence of prejudice); *Caton v. State*, 709 P.2d 1260, 1266 (Wyo. 1985) (where delay exceeds point where there is a probability of substantial prejudice, burden is on prosecution to prove a lack of prejudice).

This conflict among state and federal jurisdictions appears to have its roots in ambiguities in this Court's decisions. Some courts seem influenced by the reference in *Barker* to a presumptively prejudicial delay as a "triggering mechanism." Those courts do not carry the presumption forward into the subsequent weighing process. *See, United States v. Sears Roebuck and Co.*, 877 F.2d at 739 (presumptively prejudicial delay is a threshold factor, which necessitates inquiry into other three factors); Opinion of New Mexico Court of Appeals, App. at 31. Other courts seem influenced by the reference to a "presumption" of prejudice, and hold that it carries forward until rebutted. *See Taylor v. State*, 429 So.2d at 1174-1175; *State v. Harvey*, 713 P.2d at 521; Opinion of the New Mexico Supreme Court, App. at 5-6. Some courts are also influenced by Justice Brennan's concurrence in *Dickey v. Florida*, 398 U.S. 30, 55-56 (1970), which posits that prejudice may be presumed after a lengthy delay. *See Caton v. State*, 709 P.2d at 1266; Opinion of the New Mexico Supreme Court, App. at 7. Clearly, only this Court can resolve

these differences authoritatively and assure uniform enforcement of speedy trial rights in the various state and federal jurisdictions.

2. The Opinion Below Reflects A Significant And Recurring Problem Concerning The Enforcement Of Constitutional Speedy Trial Rights.

The differing opinions of the New Mexico Supreme Court, and the New Mexico Court of Appeals aptly illustrate that the same facts can easily lead to different results, depending upon which approach is used to resolve the presence or absence of prejudice in a speedy trial claim. As the New Mexico Supreme Court pointed out, the two appellate courts differed only as to the weighing of the prejudice component and reached different results because of the different standards they applied as to allocation of burdens. Opinion of the New Mexico Supreme Court, App. at 2-3, 8; Dissenting Opinion, App. at 21. Thus, the speedy trial rights of an accused may vary from jurisdiction to jurisdiction, according to how prejudice is analyzed. As noted above, there is widespread conflict as to that question. Therefore, there will be widespread disparity in the application of this important constitutional right. Constitutional rights should not vary based solely upon geographical location. This Court should exercise its power to resolve this issue, in the interest of fairness and uniformity.

It should also be noted that this question has been recurring for at least twenty years. Justice Brennan's concurrence in *Dickey* notes that precisely the same differences of approach existed in 1970. *Dickey*, 398 U.S. at

52-53 (some courts have required the defendant to show prejudice; some have presumed prejudice from lengthy delays). These conflicts have continued to this day, and seem unlikely to go away without the intervention of this Court.

Lastly, it should be noted that the presence or absence of prejudice has been shown to be an important factor in speedy trial analysis. Of course, prejudice is not indispensable in a speedy trial claim. *See Moore v. Arizona*, 414 U.S. 25 (1973). However, in reality it seems that few cases are egregious enough to be resolved without any consideration of prejudice. Instead, courts seem to find it necessary to evaluate that factor in order to adjudicate the ordinary case. *See e.g., United States v. Jenkins*, 701 F.2d at 857 (while finding of prejudice is not necessary under *Moore*, there is some reluctance to find a speedy trial deprivation absent prejudice); *Ringstaff v. Howard*, 885 F.2d 1542, 1544-1545, (11th Cir.) *cert. denied* 110 S.Ct. 2622 (1990) (courts should not lightly dispense with prejudice requirement unless the other three *Barker* factors weigh *heavily* against the government); *Caton v. State*, 709 P.2d at 1266 (although prejudice is not absolutely essential under *Moore*, in most cases it is a very important factor). As noted earlier, the present case hinged entirely upon the presence or absence of prejudice.

Resolution of the proper approach to prejudice analysis under *Barker* is the type of question that is sufficiently important and recurring to justify an expenditure of this Court's resources.

3. The Decision Below Is Incorrect.

The approach taken by the New Mexico Supreme Court conflicts in principle with the approach used by this Court in analyzing the prejudice component of the *Barker* test. In *Barker*, this Court found that the five-year delay was sufficient to trigger analysis of the remaining factors, but found minimal prejudice to the defendant. *Barker*, 407 U.S. at 533-534. This indicates that the Court did not consider that prejudice was presumed from the delay itself. Instead, the Court looked for specific prejudice in light of the interests protected by the speedy trial right: prevention of oppressive pretrial incarceration, prevention of anxiety and limitation of impairment of the defense. *Id.* Similarly, in *United States v. Loud Hawk*, 474 U.S. 302 (1986), the Court found that the ninety-month delay was presumptively prejudicial, triggering analysis under the *Barker* test. 474 U.S. at 314. However, the Court then found that the circumstances gave rise merely to a "possibility" of prejudice under *Barker* analysis, and concluded that possibility was insufficient to support the speedy trial claim. *Loud Hawk*, 474 U.S. at 315. Clearly, this Court has not proceeded as though a presumptively prejudicial delay resolves the prejudice inquiry in favor of a defendant, and places the burden of rebuttal on the prosecution. The opinion below apparently conflicts with that approach.

Moreover, it is bad policy to require the prosecution to rebut a presumption of prejudice, in lieu of having that factor weighed against it. As the dissent below, and the New Mexico Court of Appeals pointed out, the prosecution simply does not know what the defense will be, and

must positively prove a negative to prevail. App. at 19-20 and 32. This is an unrealistic burden to bear. It would also be quite difficult for the prosecution to show a lack of anxiety and concern, without calling the defendant to the stand. Defendant is the one who knows how he has been prejudiced, and he is the one who should present that evidence, in order to tip the scales in his favor on that factor.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New Mexico Supreme Court on this issue.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

JOHN B. WORK,

Petitioner,

No. 18,626

vs.

STATE OF NEW MEXICO,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

(Filed Sept. 6, 1990)

Art Encinias, District Judge

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OPINION

MONTGOMERY, Justice.

We granted certiorari to consider this case in connection with the then pending case of *Zurla v. State.* We recently decided *Zurla,* 109 N.M. 640, 789 P.2d 588 (1990), holding that in the circumstances of that criminal case the defendant's right to a speedy trial was violated. We now reach the same result in this case and take the opportunity it affords to explain one of the aspects of our decision in *Zurla:* the function of the presumption of

prejudice arising from a finding that there has been a lengthy delay in bringing the defendant to trial.

I.

Defendant John Work was arrested and charged in magistrate court on April 24, 1986 with criminal solicitation. On September 22, 1986, the magistrate dismissed the charge without prejudice, noting that "[t]his matter will be presented to the Santa Fe County Grand Jury." On December 17, 1987, defendant was indicted on four counts of criminal solicitation and one count of aggravated battery. Jury trial was scheduled for August 22, 1988. On July 11, 1988, defendant moved to dismiss the indictment on speedy trial grounds. After a hearing, the trial court granted the motion and dismissed the indictment with prejudice.

The state appealed to the court of appeals, which reversed the trial court and held that defendant was not denied his right to a speedy trial. The court of appeals ruled that, although there was a "presumptively prejudicial" delay preceding defendant's motion to dismiss the indictment, an independent balancing of the four factors described in *Barker v. Wingo*, 407 U.S. 514 (1972), led to the conclusion that defendant's right to a speedy trial was not violated. The principal basis for this conclusion was that defendant had not established prejudice from the delay, as contemplated by the fourth *Barker* factor. The court of appeals held that defendant had the "burden of proof" to show prejudice and that there was no such showing in this case. Thus, although the court found in favor of defendant on the first and third *Barker* factors

(length of the delay and assertion of the right, respectively), it ruled for the state on the second and fourth factors (reasons for the delay and prejudice) and held that, on balance, defendant's speedy trial right was not violated.

II.

Length of the Delay. The trial court, relying on *Kilpatrick v. State*, 103 N.M. 52, 702 P.2d 997 (1985), had analyzed the delay in this case as covering the entire time period from defendant's arrest on April 24, 1986, to the date of the hearing on the motion to dismiss the indictment, August 18, 1988. This was a period of twenty-eight months. The court of appeals held that it was error to include the period of preindictment delay following dismissal of the magistrate court charges because there were no charges pending against defendant during this time and he was not subject to any restraints on his liberty. Excluding the fifteen-month period between magistrate court dismissal and grand jury indictment, the court held that the remaining thirteen-month period was nevertheless sufficient to give rise to a presumption of prejudice which required an inquiry into the remaining three *Barker* factors.

We agree with the court of appeals that the delay between time of arrest and dismissal of the indictment, even excluding the fifteen months between dismissal of the magistrate charges and filing of the indictment, was sufficiently lengthy to give rise to a presumption of prejudice. *See United States v. Martinez*, 776 F.2d 1481, 1483 (10th Cir. 1985) (only prejudice shown to trial court was

"the presumption arising out of the length of the delay itself."). Because of our holding on the other *Barker* factors, we find it unnecessary to review the court of appeals' holding with respect to the intervening fifteen-month period or the trial court's contrary holding; the delay was presumptively prejudicial in any event, and this first *Barker* factor should be weighed against the state.

Reason for the Delay. We note, as did the court of appeals, that several periods of delay before dismissal of the magistrate charges and following the indictment were attributable to defendant, and agree with the court of appeals that primary responsibility for these delays should not be weighed against the state. We thus find the reason for the delay to be neutral or, as the court of appeals implicitly held, somewhat in favor of the state. Although we recognize that if the preindictment period were considered this factor would weigh strongly against the state, as the trial court found, we do not consider it further since any such holding would only strengthen our determination that the trial court reached the right result.

Assertion of the Right. The court of appeals found that defendant had timely asserted his right to a speedy trial and weighed this factor in his favor. This was based on the fact that defendant had filed his speedy trial motion on July 11, 1988, about seven months after the indictment and about five weeks before trial was scheduled to begin. We agree with the court of appeals' analysis on this factor.

III.

Prejudice to the Defendant. The point over which we disagree with the court of appeals is its analysis of the issue of prejudice to the defendant. The court held that "the presumption of prejudice due to a lengthy delay is merely a 'triggering mechanism' that necessarily brings into play an inquiry of the other three *Barker* factors" and that the presumption does not carry forward into the analysis of the fourth factor. Relying on *State v. Tartaglia*, 108 N.M. 411, 733 P.2d 356 (Ct. App.), *cert. denied*, 108 N.M. 318, 772 P.2d 352 (1989), the court held that the defendant had the burden of proving that the delay prejudiced him; the court held that he failed to meet this burden. Defendant argues that, upon a finding of presumptively prejudicial delay, the burden shifts to the state to establish lack of prejudice.

In *Zurla* we held that:

> Once the defendant has demonstrated presumptively prejudicial delay and thus triggered the *Barker v. Wingo* analysis, the presumption of prejudice does not disappear. Rather, the burden of persuasion rests with the state to demonstrate that, on balance, the defendant's speedy trial right was not violated. To the extent it suggests the state does not have this burden, *Tartaglia* is overruled.

Zurla v. State, 109 N.M. at 646, 789 P.2d at 594.

Here there was a presumption that defendant had been prejudiced by the delay. This, as the court of appeals held, is not by itself sufficient to resolve the separate factor of prejudice. However, contrary to the court of appeals' rulings in *Tartaglia*, in *Zurla*, and in this case, the presumption of prejudice does not simply vanish once the

court proceeds to analyze the other *Barker* factors; it "carries forward" and serves to shift to the state the burden to demonstrate that, on balance, the defendant's speedy trial right has not been violated.

As the Supreme Court held in *Barker,* the state can discharge this burden in a variety of ways. It can show that one or more of the following circumstances exist:[1] There were good reasons for the delay; the defendant did not timely assert his right and acquiesced in the delay; or the defendant was not actually prejudiced by the delay. The Supreme Court made it clear that none of these factors is either a necessary or a sufficient condition to a finding that there has been a deprivation of the right to a speedy trial; none of them has any "talismanic quality," and each can be assigned different significance or different weight in the "difficult and sensitive balancing process" that must take place in deciding whether the right has been violated. *See Barker,* 407 U.S. at 533. Because no factor is indispensable to a finding of violation and because each must be evaluated on a spectrum of significance, it is a mistake to think that a simple finding of, for example, "prejudice" or "no prejudice" will suffice to resolve the issue and can be made merely by assigning the "burden of proof" to one party or the other. *See Moore v. Arizona,* 414 U.S. 25 (1973).

On the question of prejudice, the delay may be so lengthy that the presumption of prejudice becomes

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[1] As indicated in *Barker,* this list is not all-inclusive; other circumstances excusing the delay or militating against a finding that the defendant's right to a speedy trial has not been violated are possible.

well-nigh conclusive and proof of actual prejudice is unnecessary. *See United States v. Avalos*, 541 F.2d 1100, 1116 (5th Cir. 1976) (where first three *Barker* factors weigh heavily in favor of accused, accused need demonstrate no prejudice at all; prejudice becomes totally irrelevant), *cert. denied*, 430 U.S. 970 (1977). In another case, the presumption standing by itself may be entitled to very little or no weight. *See Zurla*, 109 N.M. at 646, 789 P.2d at 594; *State v. Holtslander*, 102 Idaho 306, 313, 629 P.2d 702, 709 (1981) (where defendant does not attempt to show actual prejudice, presumption of prejudice should be given very little, if any, weight). Either party may offer evidence on the issue, defendant to corroborate the presumption and the state to rebut it by showing an absence of prejudice. If neither party comes forward with facts, the "probability of prejudice" (*see Dickey v. Florida*, 398 U.S. 30, 56 (1970) (Brennan, J., concurring))[2] will remain just that – a probability; but it may have greater or lesser significance in the balancing process depending on the length of the delay and the weights assigned to the other factors.

In this case the state did not attempt to rebut the presumption of prejudice. Defendant, on the other hand, reinforced it by showing that his defense was potentially impaired through weakness of a witness's memory and the witness's consequent inability to corroborate defendant's version of the events surrounding the alleged offense. Defendant also demonstrated that the state's consideration of first degree murder charges against him

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[2] "In essence . . . there is little difference between [Justice Brennan's] approach [in *Dickey*] and the one we adopt today." *Barker v. Wingo*, 407 U.S. at 530 n.30.

caused him humiliation and embarrassment and affected his reputation in Santa Fe. Although the court of appeals found that these latter circumstances (under the rubric "anxiety and concern of the accused") did not entail stress exceeding that attending most criminal prosecutions, the existence of such anxiety and concern is nonetheless a subfactor to be considered in the analysis. We conclude that this factor, prejudice to the defendant, weighs in his favor.

IV.

Summarizing, we find that the reason for the delay, if the period between dismissal of the magistrate charges and indictment by the grand jury is excluded from the analysis, weighs slightly in favor of the state. The other three factors – lengthy delay, assertion of the right, and actual prejudice to the defendant – weigh in defendant's favor. The strength of these latter factors is not overwhelming, but on balance we conclude that the trial court reached the correct result[3] – that the defendant's right to a speedy trial had been violated, and that the state had not carried its burden of persuasion to show that the lengthy delay should be excused.

The court of appeals is reversed, and the cause is remanded to the trial court with instructions to dismiss the indictment with prejudice.

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[3] *See State v. Holtslander*, 102 Idaho at 309 n.2, 629 P.2d at 705 n.2: "It should be noted that each of the *Barker* factors involves primarily factual inquiries, so that the decision of the trial court granting a dismissal is entitled to great weight."

IT IS SO ORDERED.

/s/ Seth D. Montgomery
SETH D. MONTGOMERY,
Justice

WE CONCUR:
/s/ Dan Sosa, Jr.
DAN SOSA, JR., Chief Justice

RICHARD E. RANSOM, Justice (Specially Concurring)

JOSEPH F. BACA, Justice (Dissenting)

KENNETH B. WILSON, Justice (Dissenting)

RANSOM, Justice (specially concurring).

I agree with the principles of the continuing presumption of prejudice, weight, balancing, and burdens as relied upon in the opinion announced by the Court today. However, in this case of greater than average complexity I find the presumption of prejudice entitled to little weight when consideration is limited to the thirteen-month delay consisting of five months during which charges were pending in the magistrate court and eight months following the indictment. In balancing other factors, I note the allegation of anxiety and concern over the possibility of being indicted on murder charges refers on its face to the fifteen-month preindictment period. Moreover, much of the alleged memory loss on the part of the witness also may have occurred during this period of time. To the extent that the prejudice alleged does not relate unambiguously to the period of delay considered

by the majority, it does little to shift the balance in petitioner's favor. *Cf. Zurla v. State*, ___ N.M. ___, ___, 789 P.2d 588, 595-96 (1990) (minimal prejudice established when record did not show the relationship between the inordinate delay in bringing defendant to trial and the allegation that two exculpatory witnesses could no longer be located).

There exists, however, ample authority that formal dismissal of charges for tactical reasons does not stop the running of the speedy trial right. *See United States v. Lara*, 520 F.2d 460 (D.C. Cir. 1975) (when dismissal of indictment in District of Columbia and reindictment in Florida were attributable to governmental forum shopping, interim during which no charges were pending counted under speedy trial analysis); *State v. McCrary*, 100 N.M. 671, 675 P.2d 120 (1984) (*Lara* rule not applied when *nolle prosequi* had been entered in good faith in order to allow the prosecution of more serious charges); *see also United States v. Avalos*, 541 F.2d 1100, 1111-13 (5th Cir. 1976) (four-month period between government dismissal of arrest warrants and indictment before a different district court that was attributable to government's desire to find a prosecutor who was willing to present testimony of particular witness was tactical delay and weighed heavily against the government); *United States v. Thomas*, 527 F. Supp. 261 (1981) (period following formal dismissal of charges because of governmental forum shopping counted under speedy trial analysis. *See generally United States v. McDonald*, 456 U.S. 1 (1982) (speedy trial clause has no application after government, acting in good faith, formally drops charges); *Dillingham v. United States*, 423 U.S. 64 (1975) (arrest constitutes a condition initiating running

of speedy trial right). *But see United States v. Loud Hawk*, 474 U.S. 302 (1986) (fact that government's desire to prosecute defendants was public knowledge did not affect defendants' liberty interests and thus was not sufficient under *McDonald* to allow consideration of the time during which court's dismissal of the indictment was appealed and no charges were pending against defendants).

The *Lara* line of cases recognizes that when a bad faith, tactical dismissal has been shown: (1) substance rules over form, and the speedy trial analysis includes this period of time even though no formal charges were pending; and (2) the delay caused by the government's tactics weighs heavily in favor of defendant. Although it might be argued from the Court's focus on the defendants' liberty interests in *Loud Hawk* that it is irrelevant whether charges are dismissed in good faith or in bad faith, I note that there was no issue in *Loud Hawk* of a bad faith dismissal. Moreover, the interests protected by the speedy trial right include more than just the defendant's liberty interest. *See United States v. Marion*, 404 U.S. 307, 320 (1971) (sixth amendment intended to minimize interference with defendant's liberty and to avoid disruption of employment, curtailment of associations, subjection to obloquy, and creation of anxiety in defendant as well as in defendant's family and friends). These other interests are implicated directly by bad faith dismissals. Therefore, unless and until advised differently by the Supreme Court, I would recognize the *Lara* exception as an aspect of federal constitutional jurisprudence.

Citing *United States v. Pino*, 708 F.2d 523 (10th Cir. 1983) (bad faith not shown under due process analysis when government delayed prosecution of defendant to

await outcome of stronger case against third party), the court of appeals analogizes the fifteen-month preindictment delay in this case to "investigative delay." *Cf. Johnson v. United States*, 434 A.2d 415 (D.C. Cir. 1981) (good faith dismissal to investigate case not counted in speedy trial analysis). I disagree with the court of appeals' characterization. Here, the reason given for the state's dismissal of the original charges in April 1986 was to procure the testimony of Gloria Bustos without jeopardizing its prosecution of her case. However, delay cannot be excused by reasons unconnected with the case itself. *See Zurla*, ___ N.M. at ___, 789 P.2d at 596. Moreover, *Avolos* held that dismissal motivated by the government's desire to obtain the testimony of a particular witness constituted tactical delay, did not stop the running of defendant's speedy trial right, and weighed heavily against the state. 541 F.2d at 1111-13; *see also Redd v. Sowders*, 809 F.2d 1266 (11th Cir. 1987) (delay in prosecution caused by desire to obtain testimony of co-defendant without jeopardizing its case against the latter because of his fifth amendment privilege against self-incrimination constituted advantage seeking delay under speedy trial analysis).

Additionally, the trial court noted in its findings that the state offered no explanation at all for a five-month delay between resolution of the charges against Bustos and petitioner's indictment in December 1987, and that this "casts doubt on the State's entire explanation." Being generous to the state, one might accept that it dismissed charges against petitioner solely in order to allow prosecution of its case against Bustos without having to

present her testimony against petitioner.[1] One similarly might infer that the state simply was negligent in delaying petitioner's indictment after the charges against Bustos had been resolved. The fact remains that the *dismissal* was for tactical reasons.

I conclude that the fifteen-month period of time between dismissal of the metropolitan court charges and indictment in district court should be counted for speedy trial purposes as well as the thirteen-month period following indictment. In total then, the length of the delay is twenty-eight months. The presumption of prejudice as applied to the record becomes considerably stronger and weighs heavily against the state. Moreover, when the delay caused by tactical reasons is considered in conjunction with the reasons for the delay after reindictment, the "reason for delay" factor weighs substantially in favor of petitioner, rather than slightly in favor of the state. Therefore, I conclude that the delay deprived petitioner of is right to a speedy trial guaranteed by the sixth amendment.

Finally, it is important to view in context the citation to *Holtslander* for the proposition that a trial court's determination of speedy trial claims is due some deference. *State v. Grissom*, 106 N.M. 555, 561, 746 P.2d 661, 667 (Ct. App.), *cert. denied*, 106 N.M. 439, 744 P.2d 912 (1987), held that, "[o]n appeal, a reviewing court is required to

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[1] The question can be posed, however, as to why the state sought *dismissal* of the metropolitan court charges rather than a *continuance*. Whatever the prosecutor's motives, preventing the running of the six-month rules is one consequence that attended the dismissal. *See* SCRA 1986, 5-604.

independently balance the factors considered by the trial court. . . ." Although it is entirely reasonable to defer to the trial court's findings of fact, we should not defer to his judgment of the constitutional significance of those facts. *See Lara*, 520 F.2d at 464-65 (substantial basis existed for trial court's finding that government dismissal was attributable to forum shopping, and this delay held on appeal to be unnecessary and unconscionable); *Aguilar v. State*, 106 N.M. 798, 799, 751 P.2d 178, 179 (1988) (in analyzing coerced confession claims, duty of appellate court is to make independent determination of the ultimate question of voluntariness based on totality of circumstances).

/s/ Richard E Ransom
Richard E. Ransom, Justice

WILSON, Justice, dissenting.

My application of the first *Barker v. Wingo*, 407 U.S. 514 (1972) factor to the facts in this case precludes my concurrence in the majority opinion.

Length of the Delay

I disagree with the majority's determination that the delay in this case was presumptively prejudicial. While I agree with the majority (excepting Justice Ransom's special concurrence) that the fifteen-month period between the magistrate court dismissal and the grand jury indictment should not be considered, I do not believe that the remaining thirteen-month period was sufficiently lengthy

to give rise to a presumption of prejudice triggering an inquiry into the speedy trial factors of *Barker*.

The majority and Justice Ransom's special concurrence treat the total thirteen-month period as one continuous delay. However, actually two proceedings developed. The first period of five months began with the defendant's arrest on April 24, 1986, and resulted in the magistrate court's dismissal of the charges without prejudice on September 22, 1986. The second period of eight months began with the defendant's grand jury indictment on December 17, 1987, and resulted in another dismissal on August 18, 1988, following the defendant's assertion of his speedy trial rights.

The proposition that the thirteen-month delay should be viewed in its sequence of two proceedings, consisting of five and eight months respectively, is consistent with this court's holdings in similar cases. In *New Mexico ex rel. Delgado v. Stanley*, 83 N.M. 626, 495 P.2d 1073 (1972) this court held that the speedy trial clock, interrupted by a nolle prosequi filing, started again with a subsequent indictment. *See also State v. McCrary*, 100 N.M. 671, 675 P.2d 120 (1984); *State v. Grissom*, 106 N.M. 555, 746 P.2d 661 (Ct. App. 1987).

Moreover, practical demands of the judicial process necessitate some flexibility in this case in light of the state's obligation to retry the case from beginning to end. This is not to say that the five-month delay initiated by the first filing should be discounted. But in cases such as this where the state justifiably dismissed the original charges, it should be given a reasonable period of time to bring the second action to a conclusion.

The record of this case lacks any suggestion that the state acted with bad motive or deliberate delay. I take exception to Justice Ransom's special concurrence which critizes [sic] the state for dismissing the first action for tactical reasons or for reasons "unconnected" to this case. The state dismissed the charges against the defendant in order to complete a prosecution against a codefendant and to secure testimony against the defendant. In dismissing a case which could not be substantiated by compelling evidence and in attempting to prepare the most persuasive case before bringing the defendant to trial, the state should not be condemned, but on the contrary, should be commended.

The Supreme Court stated in *Barker*: "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. As I believe the thirteen-month period in this case was not presumptively prejudicial, at this point my analysis should rest. However, I take this opportunity to comment on the remaining three *Barker* factors and their relevancy in this case.

Reason for the Delay

I agree with the majority that the reason for the delay in this case should weigh somewhat in favor of the state.

Assertion of the Right

The majority in this case agrees with the court of appeals's [sic] analysis that the defendant's assertion of

his right to a speedy trial was timely. I respectfully disagree.

The defendant in this case not only failed to assert his right to a speedy trial in a timely manner, but substantially contributed to the delay of both the first and second proceedings. The defendant twice waived the time limits for preliminary hearings and on three occasions obtained additional time in which to file pretrial motions while he sought a writ of superintending control from this court. The defendant should not be allowed to complain of a delay that he has in part caused himself. *See State v. Taranga*, 105 N.M. 592, 734 P.2d 1275 (Ct. App.), *cert. denied*, 105 N.M. 521, 734 P.2d 761 (1987), *overruled on other grounds, Zurla v. State*, 109 N.M. 640, 789 P.2d 588 (1990). *See also United States v. Loud Hawk*, 474 U.S. 302 (1986) (even in limited class of cases where pretrial appeal is appropriate, delays from such appeal ordinarily will not weigh in favor of a defendant's speedy trial claim; a defendant who resorts to pretrial appeal normally should not be able to return to the trial court and reap the reward of dismissal for failure to receive a speedy trial).

If the requirement of assertion has any validity, it is to put the state on notice that the defendant does not acquiesce to the delay and that the state must go forward in all due haste with his prosecution. The defendant's complaint of delay, filed approximately five weeks prior to the scheduled trial, was not calculated to put the state on notice that the defendant wanted a speedy trial in time for the state to react effectively. Instead, the defendant lay behind the log for as long as possible and then brought his demand for a speedy trial at a time when he had

finally eliminated any possible recourse from the appellate courts and when the state was helpless to respond. This case is a classic example of the type of defense trial tactics described in *Barker*. The Court noted: "[T]he record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried." *Barker*, 407 U.S. at 535. As in the *Barker* case, the defendant in this case did not seek a speedy trial, but to the contrary, attempted to escape the consequences of a trial altogether.

Prejudice to the Defendant

The majority states that once a presumption of prejudice is shown, such presumption "carries forward" and shifts the burden of persuasion to the state. In its analysis the majority relies upon *Zurla v. State*, 109 N.M. 640, 789 P.2d 588 (1990). It is my opinion that *Zurla* misapplied *Barker*; I consequently cannot agree with the majority's conclusion in this case that the defendant was actually prejudiced.

Zurla, having determined that the length of the delay was presumptively prejudicial, proceeded to analyze the remaining three *Barker* factors. In its discussion of the fourth factor, prejudice to the defendant, the court stated: "Once the defendant has demonstrated presumptively prejudicial delay and thus triggered the *Barker v. Wingo* analysis, the presumption of prejudice does not disappear. Rather, the burden of persuasion rests with the state to demonstrate that, on balance, the defendant's speedy trial right was not violated." *Zurla*, 109 N.M. at 646, 789 P.2d at 594. The court continued: "[N]either has the state

shown how the evidence controverts the 'presumption of prejudice' as applied to the loss of this testimony, which, as noted above, was facially material to Zurla's defense." *Zurla*, 109 N.M. at 648, 789 P.2d at 596. *Zurla* erroneously "carried forward" or superimposed the presumption of prejudice onto the fourth factor of prejudice to the defendant.

Barker provides a functional balancing test with which to determine whether a defendant's right to a speedy trial has been violated. *Barker* lends no support for the majority's proposition that the presumption of prejudice initially found to exist, the factor which triggers the further inquiry into the remaining three *Barker* factors, "carries forward" and attaches to the fourth factor. To the contrary, in balancing the factors within the factual context of the *Barker* case, the Supreme Court illustrated how to evenhandedly weigh each piece of evidence without a compelling presumption tipping the scales one way or another. *See also United States v. Loud Hawk*, 474 U.S. 302 (1986) (employing *Barker* test, Supreme Court held possibility of prejudice not sufficient to weigh fourth factor in defendant's favor).

Additionally, practical and rational constraints foreclose the success of the majority's theory. If we require the state to affirmatively disprove prejudice to a defendant in a case where the defendant has not attempted to show the same, we are placing the burden upon the state to positively prove a negative. As stated in *State v. Tartaglia*, 108 N.M. 411, 415, 773 P.2d 356, 360 (Ct. App.), *cert. denied*, 108 N.M 318, 772 P.2d 352 (1989), *overruled, Zurla v. State*, 109 N.M. 640, 789 P.2d 588 (1990):

> Second, it is difficult to conceive of how the state could come forward and effectively rebut a presumption of prejudice from the time lapse alone without knowing, at the least, how defendant claims he was prejudiced. For example, how could the state rebut a claim that a potential exculpatory witness has disappeared, causing prejudice to the defense, when the state may be unaware of the existence of such a person? How could the state rebut claims of anxiety and concern without some claim made by defendant that he, in fact, suffered such consequences from the delay? To state the proposition that the state must affirmatively rebut prejudice without knowing what prejudice defendant claims shows the impossibility of adopting defendant's position.

How can the state be expected to shadowbox its way through such an undefinable maze? The state should not be required to affirmatively prove that the defendant did not suffer prejudice by the delay. *See United States v. Martinez*, 776 F.2d 1481 (10th Cir. 1985) (when defendant failed to articulate any specific harm suffered as a consequence of prosecutorial delay, and when only prejudice shown was presumption arising out of length of delay itself, defendant's speedy trial right not violated).

In my view, the better rule is to hold that the question of actual prejudice is a factor which must be determined on balance. If a defendant brings forth evidence of prejudice, the state will have the burden of rebutting such evidence. If no evidence of prejudice is offered, then the scales are balanced. In this latter situation the question of actual prejudice would be neither for nor against either party, but neutral.

In the present case the defendant contended that he suffered humiliation, embarrassment, anxiety, and concern. He further claimed that one witness could not remember a specific conversation which allegedly occurred between the defendant and that witness. However, the defendant was unable to remember how much of the conversation the witness heard, and the witness did not testify regarding his alleged memory loss. Speculative allegations of an impaired defense and uncorroborated, general assertions of memory deterioration are unpersuasive and are subject to careful scrutiny as to their impact on a particular case when a defendant offers no proof regarding how the witness, if present, would testify. *See United States v. Jenkins*, 701 F.2d 850 (10th Cir. 1983); *State v. Grissom*, 106 N.M. 555, 746 P.2d 661 (Ct. App. 1987).

I believe the evidence of actual prejudice introduced by the defendant in this case failed to show that the defendant's anxiety and concern exceeded that ordinarily attendant to criminal prosecutions. Further, the evidence did not demonstrate that the defense witness's testimony would have been different without the delay or that, if the testimony had been available, it would have been material to the defendant's defense. But for the heavy thumb of presumption which the majority placed on the scales, the defendant's claim of prejudice would fail.

Summation

Excepting the period of time between the magistrate court's dismissal of the charges and the grand jury indictment, and considering the time necessary to complete two judicial proceedings, I do not think the length of the

delay was presumptively prejudicial. However, assuming the delay was determined to be sufficiently lengthy to give rise to a presumption of prejudice, I believe the second *Barker* factor (reason for the delay) should weigh somewhat in favor of the state, the third factor (assertion of the right) should weigh in favor of the state, and the fourth factor (prejudice to the defendant) should remain neutral. Balancing these four factors thus, I conclude that the defendant was not denied a speedy trial under the *Barker* announcements. I would remand this matter to the trial court with instructions to reinstate the case for trial.

/s/ Kenneth B Wilson
KENNETH B. WILSON, Justice

I CONCUR:

/s/ Joseph F Baca
JOSEPH F. BACA, Justice

APPENDIX B

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

No. 11,016

vs.

JOHN B. WORK,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF
SANTA FE COUNTY

(Filed June 29, 1989)

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OPINION

APODACA, Judge.

The state appeals from the trial court's dismissal of the indictment against defendant based on speedy trial grounds. The state contends the trial court erred in its speedy trial analysis by including a period of time when there were no charges against defendant. We agree,

reverse the order of dismissal and remand to the trial court.

FACTS

Defendant was arrested and charged with criminal solicitation in magistrate court on April 24, 1986. That same day, defendant posted bond and was released with the restrictions that he not travel out of the state and not consume alcohol. Defendant filed waivers of time limits for conducting the preliminary hearing through July 30, 1966 [sic] and through August 31, 1986. On September 22, 1986, the state dismissed the magistrate court charges against defendant without prejudice, noting that the matter was to be presented to the grand jury. On December 16, 1987, some fifteen months after the dismissal, defendant was indicted by the grand jury and charged with four counts of criminal solicitation and one count of aggravated battery. The charges stemmed from an alleged incident where defendant solicited Gloria Bustos (Bustos) to commit aggravated battery upon David Walsh. On July 11, 1988, defendant filed a motion to dismiss the indictment based on speedy trial grounds. After a hearing, the trial court granted the motion.

DISCUSSION AND ANALYSIS

A. General Speedy Trial Concepts

Claims alleging denial of a right to a speedy trial under the sixth amendment of the United States Constitution and Article II, Section 14 of the New Mexico Constitution are decided on a case-by-case basis. *See Barker v. Wingo*, 407 U.S. 514 (1972); *State v. Grissom*, 106 N.M. 555,

746 P.2d 661 (Ct. App. 1987); *State v. Kilpatrick*, 104 N.M. 441, 722 P.2d 692 (Ct. App. 1986). In order to facilitate this case-by-case analysis, the conduct of both the prosecution and the state, as well as the effect of the delay, is weighed according to the four-prong test enunciated in *Barker*. *See State v. Grissom; State v. Kilpatrick*. These four factors are: 1. the length of the delay; 2. the reasons for the delay; 3. the assertion of the right to a speedy trial; and 4. the prejudice to the defendant as a result of the delay. *See State v. Grissom*. A delay sufficient to give rise to a presumption of a prejudicial delay, which is what the first *Barker* factor concerns itself with, must exist before the other three factors are evaluated to determine whether a defendant has been denied his right to a speedy trial. On appeal, this court independently balances the factors considered by the trial court to determine whether speedy trial considerations warranted dismissal. *See State v. Grissom*. We shall proceed to do so.

B. Length of Delay

Defendant argues the trial court was correct in including all of the time between his arrest in April 1986 and his indictment in December 1987 in determining the delay was presumptively prejudicial. He claims it was proper for the trial court to include within that time period the fifteen months between the dismissal of the magistrate court charges and the grand jury indictment, because the mere fact that the complaint was dismissed does not toll those fifteen months, as his bond was not released, nor was he released from the restraints on his liberty. We disagree with this analysis.

The sixth amendment speedy trial guarantee does not attach until a defendant is indicted, arrested or accused. *United States v. MacDonald*, 456 U.S. 1 (1982); *United States v. Marion*, 404 U.S. 307 (1971); *State v. Grissom*. A speedy trial claim includes the time following a defendant's release on bond and its "impairment of liberty." *See Kilpatrick v. State*, 103 N.M. 52, 702 P.2d 997 (1985). The time during which an indictment is dismissed, however, should not be considered under a speedy trial analysis where a defendant is free of restrictions on his liberty. *See United States v. Loud Hawk*, 474 U.S. 302 (1986) (after the dismissal of charges, further judicial proceedings would be necessary to subject defendants to actual restraints); *State v. Grissom*.

Defendant's bond and its conditions applied only to his "appearance in the above-entitled matter," referring to his magistrate court case. Thus, when the court dismissed that case, the "above-entitled matter" ceased to exist and the conditions of release became unenforceable against defendant. *See generally State v. Garcia*, 78 N.M. 777, 438 P.2d 521 (Ct. App. 1968) (the power to require bail connotes the power to imprison in the absence of such bail). There was no case against defendant that the bond related to, nor were there restrictive conditions of release on defendant or unresolved criminal charges pending against him. *See generally State v. Sanchez*, 108 N.M. 206, 769 P.2d 1297 (Ct. App. 1989). Defendant, without citing authority, contends that after the state dismissed the initial criminal charge against him, the restrictions contained in the bond also remained in force, thus continuing to constitute an impairment to his liberty and right to a speedy trial. We reject this argument. *See In*

re Adoption of Doe, 100 N.M. 764, 676 P.2d 1329 (1984). Thus, the trial court erred in including in its length of delay analysis the fifteen-month period during which there were no outstanding charges against defendant and he was not subject to any actual restraints. *See United States v. Loud Hawk; United State [sic] v. MacDonald; State v. Grissom.*

Defendant next argues this fifteen-month period should be counted in the length-of-delay factor because the state dismissed the magistrate charges against him in bad faith in order to gain a tactical advantage. *See United States v. Lara*, 520 F.2d 460 (D.C. Cir. 1975); *State v. McCrary*, 100 N.M. 671, 675 P.2d 120 (1984). The magistrate court charges were dismissed in an attempt to first resolve the charges against Bustos, so that her testimony could be used against defendant.

Initially, we note that any delay in reindictment following the state's dismissal of criminal charges is not subject to sixth amendment protections but must be analyzed in a due process framework to determine whether the delay was solely for strategic purposes and substantially prejudiced the defense. *United States v. Jones*, 808 F.2d 561 (7th Cir. 1986), *cert. denied*, 481 U.S. 1006 (1987). This analysis comports with our determination that the trial court erred in including the fifteen-month period noted previously. This appeal raises speedy trial issues only, not due process considerations. Besides, investigative delays for purposes of gathering additional evidence are fundamentally unlike delays to gain a tactical advantage. *See United States v. Lovasco*, 431 U.S. 783 (1977). In light of this, it is reasonable for the prosecution to delay an indictment while seeking admissible evidence

on which to convict a defendant. *See United States v. Butts*, 524 F.2d 975 (5th Cir. 1975).

In this appeal, the prosecutor believed it needed to resolve the charges against Bustos before it could secure her live testimony against defendant. Additionally, it is not improper to delay a defendant's indictment in order to proceed on a stronger case to see how the outcome of that case would aid in the case against defendant. *United States v. Pino*, 708 F.2d 523 (10th Cir. 1983). Lastly, defendant only made assertions of bad faith on the part of the prosecution and presented no evidence in support of such a claim. *See State v. Jacobs*, 102 N.M. 801, 701 P.2d 400 (Ct. App. 1985) (claims of counsel are not evidence). For these reasons we believe the decision of the prosecutor to dismiss the magistrate court charges was a legitimate one and not done in bad faith to gain a tactical advantage. The fifteen-month period should thus not have been included in the speedy trial analysis based on defendant's bad-faith claim.

Excluding the fifteen-month period, then, we determine that the actual length of delay was about fourteen months (derived by adding the six months from the time of initial arrest to dismissal of the magistrate charges, and the eight months from the date of the grand jury indictment to the date of the hearing on defendant's motion to dismiss). Whether the delay is presumptively prejudicial is primarily determined by the nature and complexity of the crime, the number and complexity of the legal and factual issues involved, and the availability of the evidence of the crime. *See State v. Grissom; State v. Kilpatrick.*

Here, the police investigation was completed about one week after defendant had been arrested. Although the state argues this is a complex case involving a two-tiered conspiracy including four other individuals, the state called only one witness at the grand jury proceedings, and the indictment contained numerous counts of only two substantive offenses of criminal solicitation to commit aggravated battery and attempt to commit aggravated battery. Under these facts and circumstances, we find the length of delay was sufficient to give rise to a presumption of prejudice, requiring our inquiry into the other three *Barker* factors. *See State v. Tartaglia*, ___ N.M. ___, ___ P.2d ___ (Ct. App. 1989). We weigh this length of delay factor against the state. *See State v. Grissom* (a longer delay is tolerated in the case of white collar crime activity among several defendants consisting of multiple transactions involving large sums of money; however, a sixteen-month delay was presumptively prejudicial).

C. Reasons for the Delay

From the time of defendant's arrest to the dismissal of the magistrate court charges, the state filed a motion to continue the preliminary hearing with no objection from defendant. Thereafter, on two separate occasions, defendant agreed to waivers of the time limit for his preliminary hearing. Having agreed to the extension and waivers, defendant cannot complain of these time lapses. *See State v. McCrary*.

The eight-month period between defendant's indictment and the hearing on his speedy trial motion likewise

contains several periods of delay attributable to defendant. These include his motion to dismiss the indictment due to grand jury improprieties and his three motions to extend the deadline for filing pretrial motions. Additionally, defendant twice requested that the grand jury indictment be sealed, which requests the trial court honored. Any delay arising from hearings required on defendant's motions and not caused by the prosecution must be weighed against defendant. *State v. Grissom.* Where a defendant causes or contributes to the delay in bringing himself to trial, he cannot complain of a speedy trial denial. *State v. Tarango,* 105 N.M. 592, 734 P.2d 1275 (Ct. App. 1987). Additional delay was caused by defendant's application for interlocutory appeal to this court and his request for extraordinary relief made to the supreme court. We conclude that primary responsibility for these delays should not be weighed against the state.

D. Assertion of the Right

Although the state has the primary burden of bringing a case to trial, a defendant must timely assert his right to a speedy trial. *State v. Grissom.* The weight given to a defendant's assertion is dependent on whether, and how, the assertion has been made. *Id.; Baker v. Wingo.* Defendant filed his speedy trial motion on July 11, 1988, which was about seven months after the indictment. *See State v. Kilpatrick.* That was within the time allowed by the trial court for the filing of pretrial motions and about five weeks prior to the time the trial was scheduled. *Cf. Barker v. Wingo; Martin v. Rose,* 744 F.2d 1245 (6th Cir. 1984) (this factor weighed against defendant where he does not assert the right until five days before trial); *Mathews v.*

Lockhart, 726 F.2d 394 (8th Cir. 1984) (this factor weighed against defendant where he does not assert the right until the first day of trial). Under these circumstances, we find defendant timely asserted his right to a speedy trial.

E. Prejudice to Defendant

(1) Who has the Burden of Proof?

Before we analyze the prejudice factor, we must initially address defendant's claim that a finding of presumptive prejudice shifts the burden of proof to the state to establish no prejudice. This contention was recently answered by us in *Tartaglia*, which held that a defendant who claims a speedy trial violation must bear the burden of proof on all of the *Barker* factors, except the reason for the delay. Although the Supreme Court in *Moore v. Arizona*, 414 U.S. 25 (1973), stated that *Barker* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the right to a speedy trial, *Moore* did address the burden of proof issue.

Our reading of *Barker* indicates the case did not hold that the state had the burden of showing there was no prejudice to defendant. Under *Barker*, the presumption of prejudice due to a lengthy delay is merely a "triggering mechanism" that necessarily brings into play an inquiry of the other three *Barker* factors. As such, the presumption does not function to summarily answer the separate factor of prejudice to a defendant. *State v. Tartaglia*. *See also United States v. Martinez*, 776 F.2d 1481 (10th Cir. 1985) (rejecting defendant's claim that no prejudice need be shown beyond the presumption of prejudice arising from the delay itself). This function of the presumption of

prejudice is evident from a reading of *Barker*, in which the Court engaged in a separate discussion and analysis of prejudice without carrying the presumption forward, and found no violation of the speedy trial right despite the existence of a five-year delay. *Id. See also United States v. Loud Hawk* (the possibility of prejudice is not sufficient to support respondents' position that their speedy trial rights were violated). It would indeed be ironic to place the burden of rebutting the presumption of prejudice on the state, without knowing how defendant claims he was prejudiced. *Id.*

Tartaglia also clarified *State v. Mascarenas*, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972), on which defendant relies. *Mascarenas* indicated that once the presumption of prejudice was established, the burden of proving the *absence* of prejudice may be on the state, and defendant prevailed in *Mascarenas* solely on his uncontradicted claims of prejudice, which constituted an unrebutted prima facie showing of prejudice. *State v. Tartaglia*. *Mascarenas* did not specifically focus on a determination that the presumption of prejudice carried forward. We even noted in *Mascarenas* that other New Mexico decisions apparently inferred that the burden of demonstrating prejudice was on defendant. *See generally State v. Powers*, 97 N.M. 32, 636 P.2d 303 (Ct. App. 1981); *State v. Tafoya*, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977), *modified on other grounds, Kilpatrick v. State; State v. Baca*, 82 N.M. 144, 477 P.2d 320 (Ct. App. 1970). Consequently, we disagree with defendant's claim that the state bears the burden of establishing no prejudice.

Having determined the threshold question of who has the burden of proof, we now focus on the fourth

Barker factor – prejudice to defendant. This final factor is analyzed by considering the three protected interests under the right to a speedy trial: oppressive pretrial incarceration, anxiety and concern of the accused, and impairment of the defense. *See Barker v. Wingo; State v. Kilpatrick.*

(2) Was Prejudice Shown?

a. Oppressive Pretrial Incarceration

Defendant posted bond and was released the same day he was arrested. The trial court did not find defendant suffered any oppressive pretrial incarceration. Under these circumstances, we believe defendant did not suffer oppressive pretrial incarceration.

b. Anxiety and Concern of the Accused

Defendant contends he suffered anxiety and concern over the prosecutor's consideration of bringing first degree murder charges against him and that the entire ordeal caused him great humiliation and embarrassment and directly affected his reputation in Santa Fe. Yet, although it is clear defendant was subjected to emotional pressures as a result of the charges against him, the record contains nothing to suggest any stress exceeding that attending most criminal prosecutions. *See State v. Grissom.*

c. Impairment of the Defense

Defendant argues that passage of time impaired his defense because a witness, Bud Smith (Smith), was no

longer able to remember the substance of defendant's conversation with Bustos. He asserts further that Smith was unable to corroborate defendant's assertions that the entire conversation transpired in a joking manner and did not amount to criminal solicitation.

Diminished memory claims are subject to careful scrutiny with respect to their impact on a particular case. *State v. Grissom*. Initially, we note the trial court did not find that the passage of time impaired the defense. Besides, there were conflicts in defendant's grand jury testimony concerning whether Smith was present during the relevant portion of the conversation. Defendant also stated in his affidavit that he could not remember exactly how much of the conversation Smith heard, but that, assuming Smith could remember what took place, he would be able to testify consistent with defendant's account of the conversation to the grand jury. The record indicates that Smith did not testify on his memory loss. *See State v. Grissom* (bare assertions of impairment of memory due to delay in bringing accused to trial are insufficient to show prejudice. *Cf. United States v. Jenkins*, 701 F.2d 850 (10th Cir. 1983) (speculative allegations of an impaired defense are unpersuasive where defendant offers no proof regarding how the witness, if present, would testify). For these reasons, we conclude the defense was not impaired.

CONCLUSION

On the basis of our application and balancing of the *Barker* factors to the facts in this appeal, we hold defendant was not denied his right to a speedy trial. Defendant's request for oral argument is denied, for we deem such argument unnecessary. We therefore reverse the trial court's dismissal of the indictment and remand for reinstatement on the court's calendar and for further proceedings consistent with this opinion.

IT IS SO ORDERED.

/s/ Rudy S. Apodaca
RUDY S. APODACA, Judge

WE CONCUR:

/s/ Thomas A. Donnelly
THOMAS A. DONNELLY, Judge

A. JOSEPH ALARID, Judge